Supreme Court, U.S.
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No. 96-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

ALVIN STJERNHOLM and
ELSIE STJERNHOLM,

Petitioners,

V.

The UNITED STATES OF AMERICA,
BARBARA PETERSON, DOROTHY BAN,
DEBBIE J. BROWN, individually and in their
official capacities; CECIL CLARK; BILL CLARK;
BILL SMITH; CLARK A. SMITH; PAUL SMITH;
ANN D. SMITH; CLARK AND ANN SMITH
ESTATE AND AUCTION COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNTIED STATES COURT OF APPEAL FOR THE TENTH CIRCUIT

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55 pp

QUESTION PRESENTED

Did naming the Internal Revenue Service Agents in their Official capacity create a suit against the United States?

Does 26 U.S.C. § 7433 prohibit suits against Internal Revenue Service Agents in their individual capacity for violation of the Unjust Takings clause of the Fifth Amendment to the United States Constitution?

If 26 U.S.C. § 7433 prohibits suites against Internal Revenue Service Agents in their individual capacity, should the Petitioners' have been permitted to amend their complaint to state a claim upon which relief could be granted?

PARTIES TO THE PROCEEDING

All parties to this proceeding are listed in the caption of the case.

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No. 96-

IN THE
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OCTOBER TERM, 1996

ALVIN STJERNHOLM and
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Petitioners,

V.

The UNITED STATES OF AMERICA,
BARBARA PETERSON, DOROTHY BAN,
DEBBIE J. BROWN, individually and in their
official capacities; CECIL CLARK; BILL CLARK;
BILL SMITH; CLARK A. SMITH; PAUL SMITH;
ANN D. SMITH; CLARK AND ANN SMITH
ESTATE AND AUCTION COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNTIED STATES COURT OF APPEAL
FOR THE TENTH CIRCUIT

Petitioners, Alvin Stjernholm and Elsie Stjernholm, petition for a writ of certiorari to review the judgment of the Untied States Court of appeal for the Tenth Circuit in case number 95-1197 and 95-1435 entered on May 9, 1996.

OPINION BELOW

The Petitioners seek a writ for two related cases. The opinion of the United States District Court for the District of Colorado in Stjernholm v. Peterson, et al., Case No. 94-S-1065 is reprinted in Appendix B to this petition. The opinion of the Tenth Circuit Court of Appeals in Stjernholm

v. Peterson, et al., Case No. 95-1197 is reprinted in Appendix A, and the Tenth Circuit designated the opinion for publication. The opinion of the United States District Court for the District of Colorado in Stjernholm v. United States et al., Case No. 94-S-2412 is reprinted in Appendix D to this petition. The opinion of the Tenth Circuit Court of Appeals in Stjernholm v. Peterson, et al., Case No. 95-1435 is reprinted in Appendix C to this petition.

JURISDICTION

i) Date of entry of judgment by the United States Court of Appeals for the Tenth Circuit was May 9, 1996.

ii) There was no petition for rehearing filed. There were no requests for an order granting an extension of time within which to file the petition for a writ of certiorari.

iii) N/A

iv) Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case is concerned with the proper application of the Fifth Amendment to the United States Constitution, 26 U.S.C. § 7433 and Federal Rule of Procedure 15, which are reprinted in Appendix E.

STATEMENT OF THE CASE

The Petitioners' complaint arises out of an attempted seizure and sale of personal property belonging to the Petitioners'. In brief background: a tax court decision resulted in a determination that the Petitioners owed money to the Internal Revenue Service for the tax years 1980, 1981, and 1982. The collection of the tax liability was assigned to Respondent Peterson. Respondent Peterson enlisted the assistance of Respondents Ban and Brown to effect a search and seizure of personal property belonging to the Petitioners and others in Baggs, Wyoming. Respondents Peterson, Brown and Ban also enlisted the assistance of the Smith Respondents to make the search and seizure, value the property and ultimately sell the property.

Some time prior to April 16, 1992, the Respondents met together to determine how to effect a search and seizure of the Petitioners' property in Baggs, Wyoming. The Petitioners' alleged that the Respondents met

and agreed that the property of the Petitioners' would be seized and valued below the fair market value to punish the Petitioners. On April 16 and 21, 1992, the Respondents seized property on three different locations in Baggs, Wyoming. Although alleging to have a complete list of the property to be seized and the identity of its owner, Respondent Debbie Brown was constantly inquiring of the Hacketts,[1] about who owned the various pieces of property?

April 16, 1992, officer Brown seized galvanized steel/angle iron on the Dietrich property. Later the same day, April 16, 1992, officer Brown purports to seize a semi tractor/trailer, mobile home, and loader at Hackett's residence, seizure #953CS. Seized on Jon Ranch was farm equipment, construction equipment, angle iron, buffalo fence, vehicles, (joint) steel, supply trailers, propane tanks, snowmobiles. Respondent Brown and Ban illegally seized a 1984 Travel Queen Motor Home. During the seizure Respondent Brown used the copy machine of the Hackett's to copy documents concerning ownership of a Travel Queen Motor Home. Although the documents disclosed the true owners were other than the Petitioners, the Revenue Officer seized the Motor Home. On April 21, 1992, an additional seizure was conducted on all sites. Paperwork was again given to Hacketts and not sent to the Petitioners until much later.

During these search and seizures individuals, owners and/or employees of Smith Auction Company, using aliases to avoid identification by the Petitioners made determinations as to: a) what property should be seized by the IRS; and b) what value the IRS should assign the property (which the Smiths advised the IRS to seize) as the minimum bid and then post to the seizure documents.[2] According to Internal Memorandum dated April 22, 1992, Revenue Officer, Debbie Brown was concerned about value of the seized property and stated in investigative notes that: "The third party in possession of these assets believes they are worth

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[1] Some of the personal property belonging to the Plaintiffs was stored upon property belonging to Jean and Ransom Hackett.

[2] The Petitioners alleged Smiths are not qualified to properly evaluate the value of the nature and type of property belonging to the Petitioners of which they assisted in the seizure, valuation and sale. Examples of the failure to properly identify and value property of the Petitioners: a very expensive propane pump was not identified; a cultivator was identified as being 16' when it was 20'; and the size of a 500 gallon propane tank was identified as being 1000 gallons.

approximately $4-500,000.00".[3]

Although required to make a detailed inventory of the property seized the Respondents failed to cause such an inventory to be made and delivered to the Petitioners. Property which was not seized and/or inventoried was sold by the Respondents. Property which was not seized nor sold was permitted to be dissipated and/or stolen by the Respondents.

On May 7, 1992, the Petitioners wrote to the Respondent Revenue Officers Ban and Brown in Cheyenne, Wyoming. This letter advised: that although the Petitioners left their name and phone number with the receptionist in the Cheyenne Office on April 22, 1993; as of the May 7, 1992 letter date, Petitioners had not received a notice of seizure, notice of sale or minimum bid calculations at their Denver address, but had received information from third parties in Wyoming. The letter notes the concern of the Petitioners for the loss of revenue from the sale of property, so they asked: that the galvanized angle iron be weighed at Petitioners own expense; that the seized property be moved to a single location; and offered to cooperate. Lastly the Petitioners offered to make available the receipts for purchase and extensive mechanical work for a variety of the equipment which was seized seeking "a true replacement value" of all property.

Notice of Seizure was sent by certified mail on May 8, 1992, over two weeks after the seizure. Notice of Sale was mailed May 12, 1992. The Revenue Officer compiled the minimum bids on seizures 952, 953, 954 and 955 on May 8, 1992. [4]

On May 18, 1992, certain minimum bid worksheets were revised downward by the Revenue Officer.[5]

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[3] Hand written notes related to evaluation of property show that Revenue Officer Brown was aware, for example, the value of Plaintiffs' property such as a back hoe was approximately $15,000.00 and a Massey Furguson 1150 was $15,000.00.

[4] Although on May 7, 1992, the Revenue Officer received a request for appropriate appraisals of the property from the Petitioners. There was never any appraisal made concerning the value of the property seized nor was the documentation of the Petitioners ever reviewed or evaluated to determine the value of the seized property.

[5] The background documentation concerning what items were included in the minimum bids was not contained within the package received by the Petitioners. Without the background documentation used by the revenue (continued...)

The Notice of Sale, Form 2434 was not mailed until May 20, 1992, only eight days before the sale. The notice of the sale is to be provided to the tax payers not less than 10 days before the sale 26 U.S.C. § 6335(b) and (d). The Revenue Officers responsible for the seizure and sale failed to properly publish all of the items seized and for sale in violation of 26 U.S.C. 6335(b) and the regulation and caused property of the Petitioners' to be sold far below its true value.

Petitioners attempted by telephone to advise Clark and Ann Smith, of Smith Estate and Auction Company that the property allegedly seized was under valued. On May 21, 1992, the Petitioner's had hand delivered a letter to the Smith Auction Company, and Clark and Ann Smith about their concern that the property allegedly seized was severely undervalued. The Smiths and the Auction Company and its employees, as instructed by the IRS ignored the Petitioners letters, documentation and requests for a proper appraisal.[6]

On May 28, 1992, the Smith Estate and Auction Company, and its owners and employees Clark Smith, Ann Smith, Cecil Clark, Bill Clark, Bill Smith, and Paul Smith, along with the IRS Respondents, Brown, Ban and Peterson, conducted an auction of the Petitioners' property. The Respondents made no effort to see that the property was sold as required by the statutes, regulation and manuals.[7]

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[5](...continued)
officer, the Pwtitioners had no way to know what items were being included in each minimum bid worksheet. The documentation used to determine what property was aggregated into the minimum bid calculation was not provided to the Petitionerss. Consequently, when the minimum bid worksheets were sent on May 8, 1992, there was no way to determine if the bid calculations were accurate in any regard.

[6] This letter advised the auctioneer of the Petitioners concern that the property was severely undervalued and that certain property being advertised belonged to other people. The auction company was advised to contact attorneys in Denver representing the Petitioners and the other property owners. This letter was transmitted by facsimile to the revenue officer. This letter should have again alerted the IRS to the matter concerning the appraisals.

[7] Petitioners advised the auction company Respondents and the IRS Respondents that there were in their possession receipts indicating that three weeks prior to the seizure there had been approximately $6,425.41 worth of extensive mechanical work done to the Freightliner Tractor. The (continued...)

The auction of May 28, 1992, was held with little or no planning or organization, property was described improperly so as to cause bidding below the true value of the property, property was not consolidated into one location (in fact one location was more than nine miles distant from the place of auction), and the documented information provided by the Petitioners concerning the value of the Petitioners' property was never taken into consideration. The property of the Petitioner's should have been offered for sale first in the aggregate and then in individual lots. However this was not done.

According to Revenue Officer Dorothy Ban, property seized at the second seizure, April 21, 1992, did not attract sufficient minimum bids and it was therefore not sold. However, certificates of sale were issued for the property and property was removed from the sale site.

The result of the unconstitutional and illegal actions on May 28, 1992, the Respondents caused property valued at over $200,000.00 to be sold for $36,652.50.

On May 28 and 29, 1992, individuals were removing property which was not sold from the sale sites.[8]

Property which was listed in the news paper advertisement was not seized until June 23, 1992, nearly a month after the sale of the property.[9]

The Petitioners alleged in their complaint that the Respondents violated clearly established law when: the Respondents failed to give timely

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[7](...continued)
Respondents made no effort to reconsider or recalculate the minimum bids being sought for the Petitioners property.

[8] The Petitioners are uncertain as to the precise amount of property taken without being sold, but know that items such as a hydraulic jacks, drill press, silver van box with side door, propane pump, many miscellaneous tools, and 20 tons of steel angle iron on Dietrich's property were taken. The investigative history sheets indicate the revenue officers had knowledge that the property was being taken without authority, and did nothing to prevent the dissipation of the Petitioners' assets.

[9] There were no minimum bids placed on these items. The sale of this property was in violation of section 6335, and the Petitioners never received notice of the seizure of this property. Property was sold on May 28, 1992 that was not seized or listed in the seizure paperwork of April 16 or April 21, 1992 was seized after it was sold. This illegal seizure and illegal sale is established by the documents noted as supplemental seizure of June 23, 1992. There were no minimum bid calculations made on this property and the notice of seizure was never served upon the Petitioners.

and adequate notice to the Petitioners; the Respondents failed to make a proper determination of the minimum bid required for the seized property; the Respondents failed to properly secure the property at the sale and prevent the dissipation of the Petitioners' property; the Respondents conspired to deprive the Petitioners of property without the due process of law; that the Respondents were negligent in overall search, seizure and sale of the Petitioners' property; and that the Respondents sold the property at such a low value as to amount to the taking of property for public use without just compensation.

The Petitioners contend that much of the orchestration of the search, seizure and sale of property was coordinated by Barbara Peterson from her duty station in Colorado and that at the time Brown was served the complaint she was a resident of the State of Colorado. Further the seizure actions were controlled by the Denver District Office and the Smiths were paid by the Denver District Office of the Internal Revenue Service.

On or about April 13, 1994, the Petitioners filed with the Internal Revenue Service an administrative claim for damages.

On or about May 4, 1994, the Petitioners filed a Complaint and Jury Demand in Stjernholm v. Peterson, et al., Case No. 94-S-1065 in the District of Colorado. The Respondents were then served and returns were filed. On July 6, 1994, Respondents Peterson, Brown, and Ban filed motions to dismiss.

Respondents Bill Smith, Clark Smith, Paul Smith, Ann D. Smith, Clark and Ann Smith Estate Auction Company were served on June 8, 1994. On August 4, 1994, Petitioner's moved for default as to the Smiths and the Smith Auction Company. On August 18, 1995, the Clerk entered a Notice of Default against the Smith Respondents and Clark and Ann Smith Estate Auction Company.

On August 5, 1994, the Petitioner's tendered a First amended complaint and a Motion to Amend the Complaint to add a jurisdictional statute.

On August 5, 1994, the Petitioner's also moved for the court to hold its determination with respect to Part A, 5, of Respondents' Peterson, Ban and Browns Motion to Dismiss in abeyance pending determination of Petitioners' Administrative Claim pursuant to 26 U.S.C. § 7433 and a Declaration supporting the Motion.

On August 5, 1994, the Petitioner's filed their brief in opposition to the Motion to Dismiss by Respondents Brown, Ban and Peterson.

On August 25, 1994, Respondents Ban, Brown and Peterson Moved to Dismiss the Amended Complaint. This same day Respondents

Ban, Brown and Peterson filed their response to the Motion of Petitioner to hold a determination of Part A, 5 of Respondents motion to dismiss in abeyance pending the determination of the Petitioners' administrative claim pursuant to 26 U.S.C. § 7433.

On August 30, 1994, the Honorable Daniel B. Sparr granted the motion of Respondents Brown, Ban and Peterson to dismiss the complaint; denied the Motion of the Petitioners' to hold the determination of Part A, 5 of the Respondents Motion to Dismiss in abeyance pending determination of Petitioners' administrative claim pursuant to 26 U.S.C. § 7433; and denied the motion to amend the complaint to add jurisdictional statue.

On September 6, 1994, the Smith Respondents wrote a letter to the Court that Judge Sparr treated as a motion to set aside the entry of default. The Petitioner opposed the setting aside of the default. Judge Sparr granted the motion to set aside the default and accepted the letter as an Answer to the Complaint.

On September 8, 1994, the Court issued an Order to Show Cause why the case should not be transferred to the United States District Court for the District of Wyoming.

On September 26, 1994, the Petitioner's filed a Notice of Appeal of the Order dismissing Respondents Peterson, Ban and Brown.

On September 27, 1994, Petitioner's filed a Motion to Treat as a Motion to Reconsider the Opposition to the Response of the Respondents Smiths[10] of September 2, 1994.[11] On the same day the Petitioner's also moved for a stay pending appeal and moved for an extension of time to respond to the order to show cause until the court rules on the motion for stay pending appeal.

On September 28, 1994, the Court granted the motion for stay pending appeal; granted the Petitioners an extension of time to respond to the Order to Show Cause until the ruling on the motion for stay pending

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[10] Reference to the Smith Respondents/Defendants or Respondents/Defendants Smith is reference to: Bill Smith, Clark Smith, Paul Smith, Ann D. Smith, Clark and Ann Smith Estate Auction Company.

[11] The reason for this motion was the Smiths letter was dated on September 2, 1994, and which the Court treated as a Motion to vacate the default judgment and answer to the complaint on September 8, 1994, and the Petitioners' opposition filed on September 15, 1994. The Order of the Court and the Brief of the Petitioners must have crossed in the mail. Thus, the Petitioners sought the court to reconsider its Order of September 8, 1994, based on the September 15, brief in response to the letter of the Smiths'.

appeal; and, denied the motion to treat the motion to reconsider opposition to the response of Respondents smith.

On October 18, 1994, the Internal Revenue Service Denied the Petitioners' administrative claim for damages. On October 21, 1994, following the denial of the administrative claim and pursuant to the instructions of the trial court of August 30, 1994, the Petitioners filed Stjernholm v. I.R.S., 94-S-2412 Court of Appeal No. 95-1435. The Respondents were then served and returns were filed. On December 21, 1994, the United States moved to dismiss the complaint. On December 21, 1994, Respondents Peterson, Brown, and Ban filed motions to dismiss.

On January 24, 1995, the Petitioner's filed their brief in opposition to the Motion to Dismiss by Respondents United States, Brown, Ban and Peterson.

On February 22, 1995, the Petitioner's moved to consolidate the case on appeal 94-S-1065 with 94-S-2412 because the issue of the cases were factually similar and both cases were pending before Judge Sparr. On February 24, 1995, the Court denied the motion to consolidate the two cases.

On February 17, 1995, this Court of Appeal dismissed the Appeal in CA #94-1463 as jurisdictionally defective since the district court had not resolved all the issues as to all the parties. The mandate from the court of appeal was filed on February 21, 1995.

On February 22, 1995, the Petitioner's moved to consolidate the case on appeal 94-S-1065 with 94-S-2412 because the issue of the cases were factually similar and both cases were pending before Judge Sparr. The Petitioners also moved to lift the stay. On February 24, 1995, the District Court lifted the stay, denied the motion to consolidate, and ordered responses to the Order to Show cause why the action should not be transferred to the United States District Court in Wyoming. On March 6, the Petitioners moved to have the court vacate its order of dismissal of Respondents Peterson, Brown and Ban. On March 13, 1995, Respondents Brown, Ban and Peterson responded to the Petitioner's motion to vacate order of dismissal. On March 15, 1995, in a Minute Order the Court denied the motion to vacate the Order of Dismissal of Respondents Brown, Ban and Peterson.

On March 17, 1995, the Petitioner's Responded to the Order to show cause why the case should not be transferred to Wyoming. On April 10, 1995, the District Court dismissed the complaint for improper venue. The Order of dismissal was entered in the Docket on April 12, 1995. The Petitioners then filed their appeal. On Appeal the trail court

was affirmed by the Court of Appeals for the Tenth Circuit on the issues the Petitioners seek to bring before this honorable Court.

On September 18, 1995, the Honorable Daniel B. Sparr granted the motion of Respondents United States, Brown, Ban and Peterson to dismiss the complaint. The Petitioners then filed their appeal. On Appeal the trail court was affirmed by the Court of Appeals for the Tenth Circuit on the issues the Petitioners seek to bring before this honorable Court.

REASONS FOR GRANTING THE WRIT

I. DID NAMING THE INTERNAL REVENUE SERVICE AGENTS IN THEIR OFFICIAL CAPACITY CREATE A SUIT AGAINST THE UNITED STATES?

To illustrate the effect of the two decisions of the District Court and the Tenth Circuit Court of Appeal the following time lines should be kept in mind. The IRS seized the Petitioners' property on April 16 and 21, 1992. The IRS conducted an auction on May 28, 1992. The Petitioners' published a "Public Notice" in a newspaper of general circulation in Cheyenne, Wyoming on August 21, 1992. The IRS released hundreds of documents pursuant to a Freedom of Information Act request on August 5, 1993. Petitioners' filed their administrative claim pursuant to 26 U.S.C. 7433 on April 13, 1994. Petitioners filed the complaint in Stjernholm v. Peterson et al., No. 94-S-1065, May 4, 1994. The District Court dismissed the federal defendants in Stjernholm v. Peterson et al., No. 94-S-1065, on August 10, 1994. The IRS denied the administrative claim pursuant to 26 U.S.C. 7433 on October 18, 1994. Petitioners' filed the complaint in Stjernholm v. IRS, No. 94-S-2412 on October 21, 1994. The District Court dismissed Stjernholm v. IRS, No. 94-S-2412 on September 18, 1995.

The District Court in Stjernholm v. IRS, No. 94-S-2412 determined that the statute of limitations began to run against the Petitioners on August 12, 1992.

In Stjernholm v. Peterson et al., No. 94-S-1065 the Petitioners named the federal defendants in their individual and official capacities. The District Court in Stjernholm v. Peterson et al., No. 94-S-1065 dismissed the case and never considered whether or not the individual federal defendants named in their official capacity was a suit against the United States. Under the circumstances in these two cases the Petitioners were timely in Court following the filing of their Administrative Claim

pursuant to 26 U.S.C. § 7433 with the Internal Revenue Service. The Petitioners named the federal Respondents officially. The Petitioners request that this Honorable Court accept the Petition for Certiorari to review this question.

On April 13, 1994, the Petitioners' filed an administrative claim for damages with the Internal Revenue Service. This Claim was pending during the proceedings in Stjernholm v. Peterson et al., No. 94-S-1065. The District Court was aware of the claim, as was Peterson, Ban, Brown and the Department of Justice. The Petitioners' correctly contend that if an action is brought against the individual in his official capacity, it is, in essence, a suit against the sovereign of which the officer is an agent. Edelman v. Jordan, 415 U.S. 651, 663 (1974). Even where an action is against named individual defendants, if the acts complained of consist of actions taken by the defendants in their official capacity as agents of the United States, the action will be deemed to be against the United States. Atkinson v. O'Neill, 867 F.2d 589, 590 (10th Cir. 1989); Ecclesiastical Order of the Ism of Am, Inc. v. Chasin, 845 F.2d 113, 115 (6th Cir. 1988); Del Raine v. Carlson, 826 F.2d 698, 708 (7th Cir. 1987).

The federal Respondents sought and received a United States Attorney statement that they were acting in their official capacities when the events complained of took place. In light of this, it is clear that the Petitioners had named the United States as a party. However, the District Court overlooked this and dismissed the complaint and the Court of Appeals affirmed.

There can be no doubt that if the cause cannot be maintained under the Fifth Amendment to the Constitution, then it could have been maintained pursuant to 26 U.S.C. § 7433 since the Federal Defendants were named in their official capacity. The trial court determined this to be irrelevant and dismissed the complaint in Stjernholm v. Peterson et al., No. 94-S-1065. This series of events brings us to the cause of action in Stjernholm v. I.R.S., No. 94-S-2412. When the District Court dismissed the federal defendants, the District Court stated:

> "The damages sought by the Plaintiffs against these three Defendants cannot be awarded until and unless the available administrative remedies have been exhausted. *See* 26 U.S.C. 7433(d)(1).

See Order, Stjernholms v. Peterson, 94-S-1065, Appendix B, page 2, filed August 30, 1994.

Immediately following the IRS' denial of the Administrative Claim the Petitioner sued these defendants based upon the order of the trial court. Thus, if the dismissal of Stjernholm v. Peterson et al., No. 94-S-1065 was

valid then the Petitioners were entitled to proceed in Stjernholm v. I.R.S., No. 94-S-2412 against the individual Respondents. In point of fact, as argued infra, the denial of the cause of action in both of these cases has denied the Petitioners access to their remedy. Naming Peterson, Brown and Ban in their official capacity was sufficient to have sued the United States. A position that the Department of Justice advances not infrequently. The United States also argued that the Petitioners were prevented from bringing their action until 6 months had passed by pursuant to 26 C.F.R. 301.7433-1(d)(1)(ii). The pertinent portion of Section 7433 provides:

> (d) Limitations.
>
> (1) Requirement that administrative remedies be exhausted. A judgment for damages shall not be awarded under subsection (b) unless the court determines that the plaintiff has exhausted the administrative remedies available to such plaintiff within the Internal Revenue Service.
>
> (3) Period for bringing action. Notwithstanding any other provision of law, an action to enforce liability created under this section may be brought without regard to the amount in controversy and may be brought only within 2 years after the date the right of action accrues.
>
> 26 U.S.C. Section 7433(d)(1) and (d)(3).

Notwithstanding this plain language, the Secretary's regulation attempts to impose a six (6) month limitation period not envisioned by Congress and without delegated authority to do so. See 26 C.F.R. Section 301.7433-1(d)(1)(ii). Such limitation is without authority and void, since it exceeds any delegation of authority by Congress. See e.g. Rowan Cos. v. United States, 452 U.S. 247 (1981). The Petitioners were left with a peculiar dilemma, proceed directly to court while the administrative claim was pending, wait six months for exhaustion or seek leave to amend the complaint.

The conflict between the statute and regulation is clearly demonstrated by 26 C.F.R. 301.7433-1(d)(2), which provides a waiver of the six month period when the administrative claim is filed during the last six month of the period of limitations.

> If an administrative claim is filed in accordance with paragraph (e) of this section during the **last** six months of the period of limitations described in paragraph (g) of this section, the taxpayer may file an action in federal district court any time after the administrative claim is filed and

before the expiration of the period of limitations.

It is obvious that Congress did not delegate or intend for the Secretary to impose without authority a six month time period before an administrative claim could be filed in federal court. Such imposition of a time period created a conflict between the two year limitation period contained in the statute (Section 7433(d)(3)) and the regulation, because the six month period would shorten the limitation period enacted by Congress. Stated another way, the Respondent could argue that the Petitioners cause of action is currently barred by a regulation, but all actions brought within the last six months of the two year limitation period are timely. This creates an absurd result that Congress could not have intended. The regulation exceeds the authority delegated to the Secretary and should be ignored.

The amazing twist of these two cases is that the Petitioners are left without a remedy where their property has been taken and they were not justly compensated in the taking. The effect of ignoring the naming of the United States through the federal Respondents in their official capacity, was to dismiss the suit such that a claim could not be stated against the United States pursuant to 26 U.S.C. § 7433 in Stjernholm v. I.R.S., No. 94-S-2412 because the Petitioners were already barred by the statute of limitations.

The Petitioners sought the District Court in Stjernholm v. Peterson, No. 94-S-1065 to conclude that the complaint could be construed against the United States because they had sued the federal Respondents in their official capacity. The District Court declined and the Court of Appeals affirmed the District Court's decision in Peterson. Proceeding on the district court's instructions in Peterson, once the IRS denied the administrative claim the Petitioners filed Stjernholm v. IRS, No. 94-S-2412 asserting the claim made administratively pursuant to 26 U.S.C. § 7433. However, the District Court then concluded that the Petitioners were time barred in bringing the complaint in Stjernholm v. IRS, No. 94-S-2412.

II. DOES 26 U.S.C. § 7433 PROHIBIT SUITS AGAINST INTERNAL REVENUE SERVICE AGENTS IN THEIR INDIVIDUAL CAPACITY FOR VIOLATION OF THE UNJUST TAKINGS CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

The unjust takings clause of the Fifth Amendment to the United States Constitution prevents the Internal Revenue Service from taking property and selling it at auction at a price below the fair market value of the property. The Petitioners invoked the jurisdiction of the District Court under the Fifth amendment to the Constitution. The Constitution provides that federal courts may be given original jurisdiction over "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." U.S. Constitution, Art. III, §§s 1, and 2. Since 1875, Congress has provided the federal trial courts with general jurisdiction over such cases. See Judiciary Act of March 3, 1875, § 1, 18 Stat. 470; 13B C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3561 (2nd Ed. 1984); American Law Institute, Study of the Division of Jurisdiction between State and Federal Courts 162-163 (1969).

Because one basis of the Petitioners' suit is the recovery of "just compensation" of the taking of their property, they are entitled to proceed under the Constitution. The Congress cannot eliminate the Constitutional protection of the Fifth Amendment simply by passing a statute. The Constitution prohibits the taking of property by the government without just compensation. The Petitioners complain that the actions of the revenue officer Respondents and others constituted the taking of property without just compensation and they are therefore entitled to relief under the Constitution.

Further, an action under Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971) for damages against federal officers is permitted pursuant to 28 U.S.C. 1331 for violations of the Due Process Clause of the Fifth Amendment. See Davis v. Passman, 442 U.S. 228 (1979).

The Respondents argued that the Congress has created a remedy under section 7433 for the injury the Petitioners complain of and cite Schweiker v. Chilicky, 487 U.S. 412 (1988) for authority. Schweiker involved questions concerning benefits available under the Social Security

system The system provided for several steps of review.[12] There is no elaborate system of review of the administrative seizure and sale provisions of the IRS. The Trial Court dismissed the Federal Defendants on the ground that the Petitioners' had not exhausted their administrative remedy.[13] In fact there is no available judicial intervention in administrative sale procedures until the tax is paid. See 26 U.S.C. 7421. In an administrative seizure and sale of personal property there are no checks and balances to the overzealous exercise of power by Revenue Officers. Under the circumstances of this case, if there is no review available for unconstitutional deprivation of property without just compensation the Respondents could seize and sell all the assets of the Petitioners at an amount below the "fair market value", thus leaving the alleged liability unpaid and the Petitioners' without review.

The Supreme Court's Opinion in Jacobes v. U.S., 290 U.S. 13 (1933) is instructive:

> That right was guaranteed by the Constitution. The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not

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[12] An initial determination of eligibility was made by a state agency. This determination was subject to de novo reconsideration by the state agency where additional evidence could be presented. If the claimant was still dissatisfied with the state agency's decision he could seek review to the Secretary of Health and Human Services, through a federal Administrative Law Judge. During the ALJ stage new evidence or issues could be raised. If the claimant is still dissatisfied, a hearing could be sought before an Appeal counsel of the Social Security Administration. Once these steps were exhausted, a claimant could seek judicial review of any constitutional claims. In the Schweiker, decision the court noted that any person who had entered the review process and received fully restored benefits through the administrative process would lack standing to invoke the Constitution under the statute's administrative review provision. Schweiker, Supra, at 424-425. For the conduct alleged herein there is no adequate administrative review procedure with the number and types of safeguards in Schweiker.

[13] The Petitioners contend that in order to be compensated for the taking of property for public use without just compensation, they are not required to resort to a statutory scheme to seek just compensation. Alternatively, if there is a statutory scheme, 26 U.S.C. 7433 falls short of being adequate when the statute caps the recovery. And, as an additional alternative, the Petitioners submitted the Declaration of Alvin Stjernholm which established that the Petitioners had exhausted their administrative remedies pursuant to 26 C.F.R. 301.7433-1.

> change the essential nature of the claim. The form of the remedy did not qualify the right. It rested upon the Fifth Amendment. Statutory recognition was not necessary. A promise to pay was not necessary. Such a promise was implied because of the duty to pay imposed by the Amendment. The suits were thus founded upon the Constitution of the United States. * * *.
>
> The amount recoverable was just compensation, not inadequate compensation. The concept of just compensation is comprehensive and includes all elements, "and no specific command to include interest is necessary when interest or its equivalent is a part of such compensation." The owner is not limited to the value of the property at the time of the taking; "he is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking." Interest at a proper rate "is a good measure by which to ascertain the amount so to be added." Seaboard Air Line R. Co. v. United States, 261 U.S. 299, 306, 67 L.Ed. 664, 669, 43 S.Ct.354.

Jacobes, Supra, 16-17.

In order to make the decision in Jacobes, the Supreme Court relied on its earlier decision of Seaboard Air Line R. Co. v. United States, 261 U.S. 299, 306 (1922), where it stated: "It is obvious that the owner's right to just compensation cannot be made to depend upon state statutory provisions. The Constitution safeguards the right and § 10 of the Lever Act directs payment. The rule above referred to, that, in absence of agreement to pay or statute allowing it, the United States will not be held liable for interest on unpaid accounts and claims, does not apply here. The requirement that 'just compensation' shall be paid is comprehensive, and includes all elements, and no specific command to include interest is necessary when interest or its equivalent is a part of such compensation." In Phelps v. United States, 274 U.S. 341, 343-344 (1926) the cause was again settled:

> Under the 5th Amendment plaintiffs were entitled to just compensation; and, within the meaning of § 145, the claim is one founded on the Constitution. Moreover, it has long been established that, where pursuant to an Act of Congress private property is taken for public use by officers or agents of the United States, the government is under an implied obligation to make just compensation.

> That implication being consistent with the constitutional duty of the government as well as with common justice, the owner's claim is one origins out of implied contract. [Citations omitted.] * * * Acts of Congress are to be construed and applied in harmony with and not to thwart the purpose of the Constitution. The government's obligation is to put the owners in as good position pecuniarily as if the use of their property had not been taken. They are entitled to have the full equivalent of the value of such use at the time of the taking paid contemporaneously with the taking.

To permit the Respondents to seize the property of the Petitioners for the payment of taxes (to be used for the "public good") then sell it for a minimal portion of its value and yet pretend that the Constitution does not protect the value of the property is in a word, absurd. If this is true then why have requirements in the Internal Revenue Code for the determination of the value of property? See 26 U.S.C. § 6335(e) and 26 C.F.R. 301.6335-1(c)(3). Clearly these requirements are part of the Congressionally mandated scheme to keep the taking of property by distraint within the confines of due process contemplated by the Fifth Amendment. If there were no requirement that the property be valued fairly, then property could be taken and sold for pennies on the dollar, hence forever prohibiting the collection of the full amount of the tax, and thereby preventing the invoking of the claim for refund statute, at 26 U.S.C. § 7422.

The Petitioners established the special factors counseling hesitation in proceeding do not exist. The second prong the Respondents asserted was that Congress provided an alternative remedy other than a suit against the Revenue Officers. The text of 26 U.S.C. 7433 shows that Congress limited recovery.

> (a) IN GENERAL. - If, in connection with any collection of Federal tax with respect to a taxpayer, any officer or employee of the Internal Revenue Service recklessly or intentionally disregards any provision of this title, or any regulation promulgated under this title, such taxpayer may bring a civil action for damages against the United States in a district court of the United States. Except as provided in section 7432, such civil action shall be the exclusive remedy for recovery damages resulting from such actions.
>
> (b) DAMAGES - In any action brought under

> subsection (a), upon a finding of liability on the part of the defendant, the defendant shall be liable to the plaintiff in an amount equal to the lesser of $100,000 or the sum of —
>
> > (1) actual, direct economic damages sustained by the plaintiff as a proximate result of the reckless or intentional actions of the officer or employee, and
> >
> > (2) the costs of the action.

This language shows that the statute limits the amount of recovery. The Petitioners have already shown that Congress cannot limit the extent of the compensation clause of the Constitution. Thus if 26 U.S.C. § 7433 is to be construed to be a remedy, its application extends only to the reach of the first $100,000.00. The balance of the alleged damage to the Petitioners in this case exceed this amount significantly! The Petitioners contend the property which was taken for public use was valued in excess of $200,000.00 (two hundred thousand dollars). The Respondents argue that their liability cannot exceed $100,000 and above the limit the Petitioners are simply out the loss. This is an erroneous and unconstitutional interpretation. In fact if section 7433 is to be construed as the Respondents suggest, it is unconstitutional as applied under the Fifth Amendment to the Constitution.

III. IF 26 U.S.C. § 7433 PROHIBITS SUITES AGAINST INTERNAL REVENUE SERVICE AGENTS IN THEIR INDIVIDUAL CAPACITY, SHOULD THE PETITIONERS' HAVE BEEN PERMITTED TO AMEND THEIR COMPLAINT TO STATE A CLAIM UPON WHICH RELIEF COULD BE GRANTED?

The United States has argued that the Petitioners did not timely file their complaint. The United States has offered a copy of a "Public Notice" published in The Wyoming Eagle. The United States argues that based on this "Public Notice" that the Petitioners knew of the existence of their claim for damages and should have brought suit at a sooner time. In fact the Petitioners did, in Stjernholm v. Peterson, et al., No. 94-S-1065.

The relevant portions of 26 U.S.C. Section 7433 with respect to the limitations of actions is quoted below:

(d) LIMITATIONS. -

(1) REQUIREMENT THAT ADMINISTRATIVE REMEDIES BE EXHAUSTED. - A judgment for damages shall not be awarded under subsection (b) unless the court determines that the Petitioner has exhausted the administrative remedies available to such Petitioner within the Internal Revenue Service.

(2) MITIGATION OF DAMAGES. - The amount of damages awarded under subsection (b)(1) shall be reduced by the amount of such damages which could have reasonably been mitigated by the Petitioner.

(3) PERIOD FOR BRINGING ACTION. - Notwithstanding any other provision of law, an action to enforce liability created under this section may be brought without regard to the amount in controversy and may be brought only within 2 years after the date the right of action accrues.

The statute of limitations begins to run after the right of action accrues. Accrual of a cause, in this case, cannot occur until the completion of the administrative review by the United States, Internal Revenue Service, Respondent.

Although the Respondent United States presents a lengthy recitation of previous actions wherein the United States had sued the Petitioners (United States v. Alvin and Elsie Stjernholm, Civil Action No. 92-CV-134 (D. Wyoming)) and the appeal of the first action (Stjernholm, et al. v. Barbara Peterson, et al., Civil Action No. 94-S-1065 (D. Colo.) on Appeal 95-1197) these cases have nothing to do with the accrual of a cause of action properly brought under 26 U.S.C. 7433. The Respondent United States appears to argue: the fact the Petitioner's published a notice concerning the actions of the IRS which violated their rights establishes when the Petitioner's were cognizant that a cause might exist.

The government first argued that the statute of limitations began to run when the United States sued the Stjernholms in U.S. District Court in Wyoming on June 24, 1992. If that is the case it would have expired on June 24, 1994. The government then alternatively suggests that the statute of limitations could have begun to run on August 21, 1992, which would have expired on August 21, 1994. It is impossible that the Petitioner's

were fully informed of their claim[14] on April 16, 1992, when the first seizure occurred. The Petitioners made their administrative claim on April 13, 1994. Thus, if the position of the United States is to be sustained on the August 21, 1992, publication respective of the knowledge of the claim, then the Petitioners were entitled to amend their complaint in Stjernholm v. Peterson, et al., No. 94-S-1065, Appeal No. 95-1197. In sum the United States seeks to leave the Petitioners without a remedy.

In order for the trial court to have jurisdiction of the cause of action, according to the related ruling in Stjernholm v. Peterson, et al., No. 94-S-1065, the administrative process must be completed. (Excerpts of the Records at page 37.) Regardless of when the United States suggests that the time for filing the claim began, the Petitioners were timely in making the administrative claim and bringing an action. The Petitioners filed their administrative claim on April 13, 1994.

The United States also argues that the Petitioner cannot elect to start the statute of limitations based on his discovery of his claims. This is contrary to the regulation at 26 C.F.R. 301.7433-1(g)(2) that in order for the claim to accrue there had to have been a reasonable opportunity to discover all essential elements. Without the documents obtained through the Freedom of Information Act requests detailed in the Declaration of Alvin Stjernholm essential elements of the conspiracy and violations would not have been known. For example: the notations concerning what was actually inventoried and seized; what notices were withheld from the

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[14] The Petitioners contend that they become fully informed of their claim following the disgorging of hundred of pages of documents showing the unlawful actions by the government's agents. According to the regulation at 26 C.F.R. 301.7433-1(g)(2), states that a cause of action can only accrue when the taxpayer has had a reasonable opportunity to discover all essential elements of a possible cause of action. See Administrative Claim attached to the Complaint in this case. The Petitioner's deny that there were fully informed of the information that would have permitted them to make a valid claim containing "**all essential elements** on August 21, 1992. But, they had serious enough suspicions to publish on those claims. It should also be noted that the government does not dispute that there is in fact a valid claim made in this case. The Petitioners could not have stated their claim without the documents received from the Freedom of Information Act requests. It took the government months to act upon and release the information. It is preposterous that this agency with its known propensity for secreting documents could contend that under the circumstances the Petitioners were aware of all of the essential elements without access to the governments secret documents.

Petitioners by decisions not to mail them; revised minimum bid worksheets; how property was aggregated for sale and minimum bid calculations; the failure to post notices at the post office; negligently permitting property to be removed from the sale that had not been sold; property valuations made prior to the sale and creation of the minimum bid which reflected that the revenue agents knew the property was being sold far below its fair market value; property was seized after it was sold. See the factual discussion at pages 1-7 of the claim attached to the Complaint. The United States has not disputed that it was following the release pursuant to the Freedom of Information Act requests the Petitioner become fully aware of all essential elements. The essential elements to make the claim were not discovered until the review of the documents provided by the internal revenue service is clearly obvious from the complaint, the claim and its exhibits.

The United States additionally argues that the complaint was not filed timely. The Petitioners first filed a complaint in Stjernholm v. Peterson, 94-S-1065, Dist. Colo., on May 4, 1994. In that complaint the Petitioners sued the Respondents Ban, Brown, and Peterson in their official capacity[15]. In 94-S-1065, Counsel for the Respondents[16] in their motion to dismiss at pages 6-14 took the position that the suit could not be maintained.

> Second, the Stjernholms are not entitled to bring an action under Internal Revenue Code Section 7433 until they first exhaust administrative remedies. The Internal Revenue Code § 7433(d)(1). The Stjernholms did not allege that they have exhausted administrative remedies for bringing an Internal Revenue Code Section 7433 action, and this action must therefore be dismissed.

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[15] If the action is brought against the individual in his official capacity, it is, in essence, a suit against the sovereign of which the officer is an agent. Edelman v. Jordan, 415 U.S. 651, 663 (1974). Even where an action is against named individual Respondents, if the acts complained of consist of actions taken by the Respondents in their official capacity as agents of the United States, the action will be deemed to be against the United States. Atkinson v. O'Neill, 867 F.2d 58[illegible], 590 (10th Cir. 1989); Ecclesiastical Order of the Ism of Am. Inc. v. Chasin, 845 F.2d 113, 115 (6th Cir. 1988); Del Raine v. Carlson, 826 F.2d 698, 708 (7th Cir. 1987).

[16] Joel Roessner, was trial counsel in both proceedings 94-S-1065 and 94-S-2412.

Brief of Respondents, Stjernholms v. Peterson, 94-S-1065, page 14. (Footnote omitted.) See record on appeal in Stjernholm v. Peterson et al., 94-S-1065, (D. Colo.) Appeal No. 94-1197.

In Stjernholm v. Peterson et al., 94-S-1065, the United States argued that under section 7433 the Petitioners had no ability to maintain the action until the exhaustion of the administrative remedies. In response to the motion to dismiss in 94-S-1065 the Petitioners advised the court that there was pending before the IRS an administrative claim that had been filed on April 13, 1994. On August 5, 1994, the Petitioner's filed a motion entitled Petitioners' Motion to Hold Determination of Part A, 5 of Respondents Peterson, Ban and Brown's Motion to Dismiss in Abeyance Pending Determination of the Petitioners' Administrative Claim Pursuant to 26 U.S.C. § 7433. In that document the Petitioners advised the Trial Court that they in fact had a claim pending with the Internal Revenue Service pursuant to the statute and included a copy for the Court's convenience. The Petitioners also sought the court permission to amend the complaint once the administrative process had been exhausted.

The United States, in response to the Petitioners' Motion to Hold Determination of Part A, 5 of Respondents Peterson, Ban and Brown's Motion to Dismiss in Abeyance Pending Determination of the Petitioners' Administrative Claim Pursuant to 26 U.S.C. § 7433, took the following position:

> That the Plaintiffs may in the future have the right to bring an action against the federal government does not constitute a reason to hold "in abeyance" the dismissal of an unwarranted lawsuit against individual federal employees.
>
> Moreover, even if the federal government were a party to this suit, the Plaintiff could not hold their action "in abeyance" while they exhaust administrative remedies. In federal tax cases, administrative remedies must be exhausted before commencing an [sic] district court action, and a taxpayer cannot cure the failure to exhaust remedies after the action is commenced.

Defendants Peterson, Ban and Brown's Response to Petitioner's Motion to Hold Determination of Part A, 5 of Respondents Peterson, Ban and Brown's Motion to Dismiss in Abeyance Pending Determination of the Plaintiffs' Administrative Claim Pursuant to 26 U.S.C. § 7433, Stjernholms v. Peterson, 94-S-1065, page 2-3. See record on appeal in Stjernholm v. Peterson et al., 94-S-1065, (D. Colo.) Appeal No. 94-1197.

The position of the United States is that the Petitioners could not

proceed in 94-S-1065 with their claims against the Employee Respondents, Peterson, Ban and Brown, in their official capacity because at the time of the filing of the complaint the administrative remedies had not been exhausted. In 94-S-1065 Judge Spar ruled that:

> The Respondent correctly point out (and the Petitioners concede) that the Petitioners have not exhausted their available administrative remedies as required by the Internal Revenue Code, 26 U.S.C. § 7433(d)(1). The damages sought by the Petitioners against these three Respondents cannot be awarded until and unless the available administrative remedies have been exhausted.

Order, Stjernholms v. Peterson, 94-S-1065, page 1-2, filed August 30, 1994.

With respect to the exhaustion of the administrative remedies, the Counsel for the United States has taken conflicting positions. The United States has previously taken the position that the Petitioners could not have brought their suit until they had exhausted their administrative remedies. Stjernholms v. Peterson, No. 94-S-1065. Reviewing the time line there can be no doubt that the Petitioners' Administrative Claim was filed with the IRS well within any date expiration of the statute of limitations the United States can point out. The Administrative claim was filed on April 13, 1994: within two years from the date of the seizure; within two years from the date of the United States suit in Wyoming; within two years of the August 21, 1992, "public notice"; and within two years of the judgment of the U.S. District Court in Wyoming. Once the I.R.S. denied the claim, Petitioners filed Stjernholm v. IRS, No. 94-S-2412.

In line with the position taken by the Counsel for the United States in these two cases, it is clear that the statute begins to run from the accrual date. When administrative remedies and exhaustion is at issue, the accrual date cannot be any time prior to the expiration of six months following the making of the claim. See 26 C.F.R. 301.7433-1; Gonsalves v. U.S., 782 F.Supp. 164 (Dist. Me. 1992). In Gonsalves the court stated plainly that:

> The court agrees with Plaintiff that Defendant's "legal notices that [Plaintiff's] claims are fully disallowed," dated January 20, 1990, begins the running of the section 7433's statute of limitations. As a result, the Court finds that Plaintiff has filed his Complaint within the applicable statute of limitations under section 7433 and that his claim is not time-barred.

On October 18, 1994, the IRS sent to the Petitioners the notice attached as Exhibit "1" to the Declaration of Alvin Stjernholm stating:

> We have reviewed your administrative claim and have determined that actions taken by the Internal Revenue Service personnel surrounding the seizure and sale of the property in issue have no procedural irregularities. Therefore your claim for damages is hereby denied.

The statute of limitations began running on October 18, 1994. The Petitioner's filed the instant action three days later on October 21, 1994, seven hundred twenty seven days before the expiration of the statute of limitations.

The Petitioner also advances the following alternative argument. Pursuant to the regulation at 26 C.F.R. 301.7433-1(d)(2) the Petitioners could file suit while the administrative claim is pending:

> (2) If an administrative claim is filed in accordance with paragraph (e) of this section during the last six months of the period of limitations described in paragraph (g) of this section, the taxpayer may file an action in federal district court any time after the administrative claim is filed and before the expiration of the period of limitations.

It was therefore plain error for the District Court to have granted the motion to dismiss and prohibit the Petitioner from making the proper amendments to pleadings in Stjernholm v .Peterson et al., No. 94-S-1065 and thereby denying the Petitioners their day in court. The Appellate court affirmed that the statute of limitations has expired, then the Appellate Court had the obligation to reverse the ruling in Stjernholm v. Peterson et al., No. 94-S-1065, Appeal No. 95-1194, and vacate the dismissal ruling in 94-S-1065 and permit the amendment of the Complaint or in the alternative and under the circumstances of this litigation proceed with the law of the case stated by the trial court on April 30, 1994, and that the Petitioners could complain upon the exhaustion of their administrative remedies on the ground that the statute of limitations has not expired.

CONCLUSION

The Petitioners contend that the taking of their property valued at over $200,000.00 and selling it for $30,000.00 constituted a taking of private property without just compensation. The Petitioners were entitled to have their tax account credited with a just value. When the property of a taxpayer can be taken and sold for any deminimus amount without regard to the true value of the property an unjust taking occurres. This Court has prevented such occurrences but has not reviewed an unjust taking with respect to taxes to the best of the Petitioners' knowledge.

The authority of the IRS and its employees to seize and sell property is not without limits. One limit is contained within the United States Constitution through the Fifth Amendment. Here the Petitioners stated claims in both cases upon which relief could have been granted. The District Court and the Tenth Circuit Court of Appeals have ignored the constitutional protection provided to the Petitioners and it is upon this Court to protect the citizenry from the over zealous tax collector. The right of the government to secure the tax cannot be placed higher than the right of the people to the just compensation for their property when it is taken for the purpose of filling the federal fisk.

The Petitioners have proceeded through the American judicial system in their own personal capacity and without counsel to assist them. They were entitled at every step to have their filings construed in the most liberal fashion. The government concedes that the Petitioners are entitled to the more liberal pleading standards applied to litigants without counsel, and are thus reviewed under a less stringent standard. See In re Owens, 140 B.R. 280, 282 (D. Colo. 1992) aff'd 978 F.2d 1267 (10th Cir. 1992); Hall v. Belmon, 935 F.2d 1106, 1110 (10th Cir. 1991); Haines v. Kerner, 404 U.S. 519, 520-21 (1972). See also Olson v. Hart, 965 F.2d 940, 942 (10th Cir. 1992) (citing Haines, Supra); Herrera v. Harkins, 949 F.2d 1096, 1097 (10th Cir. 1991). The result is that if the Petitioners' could state a cause of action, they were entitled to an opportunity to amend their complaint to state such a cause. The dismissal of the two pro se complaints, without an opportunity to amend the complaint to state a cause of action was plain error. This Honorable Court should now intervene.

The federal Respondents argued two interesting views in response to the Petitioners' position that they were entitled to maintain this action. First the Respondents argued sovereign immunity. They then argued that in the Petitioners' complaint "the named IRS official damaged taxpayers by errors they allegedly made in levying upon taxpayers' property. It is thus apparent that the individual Respondents are being sued strictly in their

official capacity. Therefore, although individual officials have been named as Respondents, this action must be considered to be a claim against the United States."

The Petitioners have contended that since the Respondents were named in their official capacity, that the United States was indeed a party for purposes of determining their claims under 26 U.S.C. § 7433. See Gonsalves v. U.S., 782 F.Supp. 164 (D.Me. 1994). The Respondents have argued that "In order to bring an action under Internal Revenue Code Section 7433, a claimant must both exhaust administrative remedies and bring the civil action within two years from the date a cause of action accrues." If the Petitioner cannot maintain this action against these Federal Respondents in their individual capacities, the Petitioners were certainly entitled to proceed against them in their official capacity (i.e., against the United States). The Order of the Trial Court of August 30, 1994 should be vacated because the Petitioners indeed had exhausted their administrative remedies and had sued the Federal Respondents in their official capacity.

The Petitioners should be permitted to amend their complaint to state a cause of action in either Stjernholm v. Peterson et al., No. 94-S-1065 or in Stjernholm v. IRS, No. 94-S-2412 since the statute of limitations has the effect of barring both suits when construed as a failure to exhaust in Peterson and as having expired in Stjernholm v. IRS. The Petitioners are left with an absolute "no win" situation where through judicial determination they have no remedy: Not under 26 U.S.C. § 7433; Not under the Fifth Amendment to the United States Constitution.

WHEREFORE the Petitioners request that this court grant a writ of certiorari and accept jurisdiction to review the decisions of the courts below in order that the Tenth Circuits' decisions be reviewed and reversed.

Respectfully submitted,

Alvin Stjernholm
Elsie Stjernholm
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Denver, CO 80227
(303) 985-0427
(303) 922-8451
Petitioners

APPENDIX

PUBLISH

UNITED STATES COURT OF APPEALS

Filed 5/9/96

TENTH CIRCUIT

ALVIN STJERNHOLM; ELSIE STJERNHOLM, Plaintiffs-Appellants,	)	
v.	)	No. 95-1197
BARBARA PETERSON, DOROTHY BAN, DEBBIE J. BROWN, individually and in their official capacities; CECIL CLARK; BILL CLARK; BILL SMITH; CLARK A. SMITH; PAUL SMITH; ANN D. SMITH; CLARK AND ANN SMITH ESTATE AND AUCTION COMPANY, Defendants-Appellees.	)	

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO
(D.C. No. 94-S-1065)

Submitted on the briefs.*

Alvin Stjernholm and Elsie Stjernholm, Denver, Colorado, pro se.

Loretta C. Argrett, Assistant Attorney General, Ann B. Durney and Roger E. Cole, Department of Justice, Washington, D.C.; Henry Lawrence

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The cause is therefore ordered submitted without oral argument.

Solano, United States Attorney, of counsel, Denver, Colorado, for Defendants-Appellees Barbara Peterson, Dorothy Ban, and Debbie J. Brown.

Bill Smith, Clark A. Smith, Paul Smith, Ann D. Smith, and Clark and Ann Smith Estate and Auction Company, Cheyenne, Wyoming, pro se.

Before **BRORBY, EBEL** and **HENRY**, Circuit Judges.

BRORBY, Circuit Judge.

Plaintiffs Alvin and Elsie Stjernholm brought this action against three Internal Revenue Service agents, Barbara Peterson, Dorothy Ban, and Debbie Brown (referred to collectively as "the federal defendants"), Clark and Ann Smith Estate and Auction Company (hereafter "Smith Estate and Auction"), and six of Smith Estate and Auction's employees, Cecil Clark, Bill Clark, Bill Smith, Clark A. Smith, Paul Smith, Ann D. Smith, alleging violations of the Fourth and Fifth Amendments, as well as state law, arising out of the Internal Revenue Service's seizure and sale of certain personal property belonging to the Stjernholms to satisfy a tax lien. The Stjernholms' primary contention is that the defendants conspired to sell their personal property "below fair market value to punish the Plaintiffs" and actually "caused property of the Plaintiffs[] to be sold far below its true value."

The clerk of the district court entered a notice of default against Bill Smith, Clark A. Smith, Paul Smith, Ann D. Smith, and Smith Estate and Auction. Bill Smith, Clark A. Smith, Paul Smith, Ann D. Smith, and Smith Estate and Auction later filed a motion to set aside the entry of default and a "response" to the Stjernholms' complaint. The district court granted the motion to set aside the entry of default and treated the "response" as a formal answer to the Stjernholms' complaint. In the same order, the district court, *sua sponte*, ordered the Stjernholms to show cause why the case should not be transferred to the United States District Court for the District of Wyoming, on the ground venue was improper in the United States District Court for the District of Colorado. After receiving the Stjernholms' response to the order to show cause, the district court concluded venue was improper and dismissed plaintiffs' action. This appeal followed.

The Stjernholms contend it was error for the district court to raise the issue of venue *sua sponte* and dismiss their claims against Bill Smith, Clark A. Smith, Paul Smith, Ann D. Smith, and Smith Estate and Auction.[1] The Stjernholms are correct, at least in part. A party waives the right to challenge venue if he fails to raise that defense either in his responsive pleading or in a motion to dismiss under Fed. R. Civ. P. 12(b)(3). Fed. R. Civ. P. 12(h)(1). However, at any time *before* the defendants waive the defense of improper venue, "a district court may raise on its own motion an issue of defective venue or lack of personal jurisdiction; but the court may not dismiss without first giving the parties an opportunity to present their views on the issue." *Lipofsky v. New York State Workers Comp. Bd.*, 861 F.2d 1257, 1259 (11th Cir. 1988). The district court may do so by ordering the plaintiff to show cause why the case should not be dismissed or transferred on the ground venue is improper, provided the district court gives all parties adequate notice and an opportunity to respond. *Costlow v. Weeks*, 790 F.2d 1486, 1488 (9th Cir. 1986). This procedure gives the plaintiff an opportunity to contest the dismissal or transfer and allows the defendant the opportunity to prevent dismissal or transfer by waiving venue. *Id.*

In this case, however, the district court did not raise the defense of improper venue before Bill Smith, Clark A. Smith, Paul Smith, Ann D. Smith, and Smith Estate and Auction waived that issue. In the same order in which it directed the Stjernholms to show cause why their case should not be transferred or dismissed for improper venue, the district court accepted these defendants' "response" as their formal answer to the complaint. The defendants' response did not raise the defense of improper venue in their response, nor did the defendants seek to file an amended

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[1] The Stjernholms raise two other issues on appeal, neither of which have merit. First, they contend the district court erred when it dismissed their claims against the federal defendants pursuant to Fed. R. Civ. P. 12(b)(6). Our unpublished decision in their related appeal is dispositive. *Stjernholm v. Peterson*, No. 95-1435. They also contend the district court erred when it granted the motion to set aside the entry of default. *See* Fed. R. Civ. P. 55(c) (district court may set aside entry of default for good cause). We find no abuse of discretion. *Nikwei v. Ross Sch. of Aviation, Inc.*, 822 F.2d 939, 941 (10th Cir. 1987) ("Setting aside a default entry or default judgment is addressed to the sound discretion of the trial court, and they are given 'a great deal of latitude' in exercising their discretion.") (footnote omitted)).

answer thereafter. *See* Fed. R. Civ. P. 12(h)(1) (venue not waived if raised "in a responsive pleading *or an amendment thereof permitted by [Fed. R. Civ. P.] 15(a) to be made as a matter of course*") (emphasis added). Accordingly, in a single ruling, the district court *both* confirmed these defendants' waiver of the defense of improper venue, Fed. R. Civ. P. 12(h), *and* directed the Stjernholms to show cause why their case should not be transferred or dismissed for improper venue. In light of the defendants' waiver, it was error for the district court to order the Stjernholms to show cause, and it was also error for the district court to dismiss the Stjernholms' action against Bill Smith, Clark A. Smith, Paul Smith, Ann D. Smith, and Smith Estate and Auction for improper venue some six months later.

REVERSED AND REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Daniel B. Sparr

FILED August 30, 1994

Case No. 94-S-1065

ALVIN STJERNHOLM and ELSIE STJERNHOLM,
Plaintiffs,
v.

BARBARA PETERSON, Individually and in her official capacity, DOROTHY A. BAN, Individually and in her official capacity, AND DEBBIE J. BROWN, Individually and in her official capacity, CECIL CLARK; BILL CLARK; BILL SMITH; CLARK A. SMITH; PAUL SMITH; ANN D. SMITH; CLARK AND ANN SMITH ESTATE AND AUCTION COMPANY,
Defendants.

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the court on: (1) Defendants Peterson, Ban and Brown's Motion to Dismiss, filed July 6, 1994; (2) the Plaintiffs' Motion to Amend Complaint, filed August 5, 1994; and (3) the Plaintiffs' "Motion to Hold Determination ... In Abeyance ...," filed August 5, 1994. The court has reviewed the motions, the Stjernholms' response to the motion to dismiss, the entire case file, and the applicable law and is fully advised in the premises.

The Plaintiff are suing Defendants Peterson, Ban and Brown for compensatory and punitive damages based on the Defendants' alleged wrongful action as I.R.S. employees while handling the collection of Plaintiffs' delinquent taxes. Title 26 U.S.C. § 7433 is the exclusive remedy for recovering the damages sought by the Plaintiffs against these Defendants. 26 U.S.C. § 7433(a).

The Defendants correctly point out (and the Plaintiffs concede) that the Plaintiffs have not exhausted their available administrative remedies as required by the Internal Revenue Code, 26 U.S.C. § 7433(d)(1). The damages sought by the Plaintiffs against these three Defendants cannot be

awarded until and unless the available administrative remedies have been exhausted. *See* 26 U.S.C. 7433(d)(1); Hearne v. United States, 1993 U.S. Dist. LEXIS 6900; 93-1 U.S.T.C. ¶50,334; 71 A.F.T.R.2d 1994 (W.D. Tex. 1993); McGarvin v. United States, 1993 U.S. Dist. LEXIS 4004; 93-1 U.S.T.C. ¶50,325; 71 A.F.T.R.2d 1363 (E.D. Mo. 1993).

Accordingly, IT IS ORDERED;

1. Defendants Peterson, Ban, and Browns Motion to Dismiss is GRANTED. Defendants Peterson, Ban, and Brown are hereby DISMISSED from this civil action.

2. The Plaintiffs' "Motion to Hold Determination ... In Abeyance ..." is DENIED.

3. The Plaintiffs' Motion to Amend Complaint is DENIED.

DATED at Denver, Colorado, this 30th Day of August, 1994.

By the Court

/s/

Daniel B. Sparr
Untied States District Judge

UNITED STATES COURT OF APPEALS

Filed 5/9/96

FOR THE TENTH CIRCUIT

ALVIN STJERNHOLM; ELSIE STJERNHOLM,	)	
Plaintiffs-Appellants,	)	
v.	)	No. 95-1435
	)	(D.C. No. 94-S-2412)
BARBARA PETERSON, DOROTHY A. BAN, DEBBIE J. BROWN, individually and in their official capacities; INTERNAL REVENUE SERVICE; UNITED STATES OF AMERICA,	)	(D. Colo.)
Defendants-Appellees.	)	

ORDER AND JUDGMENT[**]

Before **BRORBY, EBEL** and **HENRY**, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The cause is therefore ordered submitted without oral argument.

[**] This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

Mr. and Mrs. Stjernholm are pro se litigants whose tax liability was judicially established. The Stjernholms commenced this action asserting illegal and negligent conduct occurred when the United States levied upon their property. The trial court dismissed their complaint and Mr. and Mrs. Stjernholm appeal this decision. We affirm the decision of the trial court.

The facts are neither complex nor disputed. The tax liability of Mr. and Mrs. Stjernholm was judicially established in 1991. *See Stjernholm v. Commissioner*, 933 F.2d. 1019, 1991 WL 88498 (10th Cir. May 22, 1991), *aff'g* 58 T.C.M. (CCH) 389 (1989). The United States seized property belonging to Mr. and Mrs. Stjernholm in April 1992, and this property was then sold at auction in June 1992. The property was seized and sold in the state of Wyoming. In August 1992, Mr. and Mrs. Stjernholm published a "Public Notice" in a newspaper of general circulation in Cheyenne, Wyoming. This notice reflected Mr. and Mrs. Stjernholm's opinion that the manner of the seizure and sale of their property violated the "1989 Taxpayers Bill of Rights." It also charged their property was sold for a small fraction of its value and the Stjernholms complained of procedural violations and IRS employees' violations of the IRS Code and illegal activities concerning the seizure and sale of their property.

Mr. and Mrs. Stjernholm commenced an earlier suit which was dismissed due to the fact they had not exhausted their administrative remedies by filing a claim as required by the FTCA. In dismissing this suit, the trial court stated damages could not "be awarded until and unless the available administrative remedies have been exhausted."

Mr. and Mrs. Stjernholm commenced this action on October 21, 1994, in the District of Colorado, against the "United States," the "Internal Revenue Service" and three individuals who were employed by the Internal Revenue Service, each being sued individually and in her official capacity. The complaint set forth numerous causes of action, all of which can be characterized by stating the Stjernholms alleged unconstitutional, illegal and negligent conduct concerning the methods employed in seizing and selling their property.

The trial court granted Defendants' motions to dismiss. The *Bivens*[1] claims against the IRS employees were dismissed because the existing statutory design was deemed the exclusive remedy for damages caused by the reckless or intentional disregard of the Internal Revenue Code and the regulations thereunder. The action against the IRS employees was

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[1] *Bivens v. Six Unknown Agents*, 403 U.S. 388 (1971).

also dismissed for improper venue, the court noting that the transfer of the action to Wyoming would be futile since Plaintiffs' claim was barred by the statute of limitations. The trial court dismissed plaintiffs' claim against the IRS employees under I.R.C. § 7433 after concluding the United States and not the individual employees is the proper defendant under this statute. The trial court dismissed plaintiffs' *Bivens* action against the United States after concluding the United States had not waived sovereign immunity in such action. The claim, based upon the Federal Tort Claims Act, was dismissed as barred by the tax exception clause in the FTCA. Finally, the court dismissed the claim under I.R.C. § 7433(d)(3) as being barred by the two-year statute of limitations based upon the public notice published by Mr. and Mrs. Stjernholm.

Mr. and Mrs. Stjernholm appeal this decision asserting: (1) the trial court erred in dismissal of the complaint on the basis of the law of the case and the statute of limitations and argued they merely followed the instruction of the court contained in the dismissal of their first suit in bringing this action; (2) the United States has waived its sovereign immunity under I.R.C. § 7433(a); (3) the FTCA does not apply as the actions of the individual defendants were not actions taken in respect of the assessment or collection of a tax; (4) The trial court's order in dismissing the first suit authorized them to file a *Bivens* claim against the individual defendants following exhaustion and it is clear that the action of the employees amounted to an "unjust taking"; (5) The Fifth Amendment is available as a remedy; and (6) the trial court had no basis to raise the venue issue.

Individual federal employees may be sued for violating rights protected by the United States Constitution; however, such suits are not authorized where Congress has "expressly precluded the creation of such remedy by declaring that existing statutes provide the exclusive mode of redress." *See Bush v. Lucas*, 462 U.S. 367, 373 (1983); *National Commodity & Barter Ass'n v. Gibbs*, 886 F.2d 1240, 1248 (10th Cir. 1989). Plaintiffs' sole remedy, therefore, is an action based upon the provisions contained in the Internal Revenue Code.

26 U.S.C. § 7433 allows a taxpayer to bring a civil action against the United States for damages arising from reckless or intentional violation of the IRS Code or Regulation by its officers or employees. The conduct set forth by the plaintiffs against the individual defendants falls directly within the provision of § 7433. Plaintiffs' remedy for these violations is solely against the United States.

26 U.S.C. § 7433 contains a statute of limitations. It provides "an action to enforce liability created under this section ... may be brought only

within 2 years after the date the right of action accrues." The applicable regulation provides "A cause of action under ... this section accrues when the taxpayer has had a reasonable opportunity to discover all essential elements of a possible cause of action." I.R.C. 7433(g)(2). The August 21, 1992 "Public Notice" published by Mr. and Mrs. Stjernholm plainly shows they then knew all essential elements of their claim. The disallowance of the claim filed by Mr. and Mrs. Stjernholm did not commence the running of the statute of limitations. Mr. and Mrs. Stjernholm ask us to apply the case of *Gonsalves v. United States*, 782 F. Supp. 164 (Maine 1994). This case is inapposite as the current regulation defining the commencement of the accrual was not adopted until after *Gonsalves* was decided.

The remaining errors asserted by Mr. and Mrs. Stjernholm are not persuasive and warrant no further discussion. We affirm the decision of the trial court for substantially the same reasons set forth by the trial court in its concise and well reasoned Memorandum Opinion and Order, a copy thereof being attached.

Entered for the Court:

WADE BRORBY
United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Daniel B. Sparr

Case No. 94-S-2412

ALVIN STJERNHOLM and ELSIE STJERNHOLM,
Plaintiffs,
v.

INTERNAL REVENUE SERVICE, UNTIED STATES OF AMERICA, BARBARA PETERSON, Individually and in her official capacity, DOROTHY A. BAN, Individually and in her official capacity, AND DEBBIE J. BROWN, Individually and in her official capacity,
Defendants.

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the court on: (1) Defendants Peterson, Ban and Brown's Motion to Dismiss, filed December 21, 1994; and (2) Defendant United States Motion to Dismiss filed December 21, 1994. The court has reviewed the Motions, the Plaintiffs' responses, the Defendants' replies, the entire case file, certain exhibits, the case file of related Civil Action No. 94-S-1065, and the applicable law and is fully advised in the premises.

I. Background

On May 4, 1994, Plaintiffs Alvin Stjernholm and Elsie Stjernholm instituted Civil Action No. 94-S-1065 against Barbara Peterson, Dorothy A. Ban, and Debbie J. Brown (the individual Defendants herein), a corporation and six other persons[1] All Defendants were sued in their individual and Official capacities, as agents or employees of the Internal Revenue Service. The Complaint alleged that the Defendants, in connection with their

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[1] The Plaintiffs named Cecil Clark, Bill Clark, Bill Smith, Clark A. Smith, Paul Smith, Ann D. Smith, and Clark and Ann Smith, Estate and Auction Company as additional Defendants.

activities related to the seizure and sale of a portion of the Plaintiffs' property in satisfaction of a tax assessment, engaged in a conspiracy, violated the Plaintiffs' due process rights, and committed acts constituting negligence and gross negligence. Defendants Peterson, Ban and Brown moved for dismissal and on August 30, 1994, this court granted the motion, holding that the Plaintiffs' exclusive remedy was under 26 U.S.C. § 7433[2] and that the Plaintiffs had failed to exhaust prerequisite administrative remedies[3]. On April 10, 1985, this Court dismissed the balance of Civil Action No. 94-S-1065 for improper venue pursuant to 28 U.S.C. § 1391(b). The Plaintiffs appealed both Order to the Tenth Circuit Court of Appeals, and on April 13, 1994 filed an administrative claim for damages with the Internal Revenue Service. The IRS denied the Plaintiff's administrative claim by letter dated October 18, 1994.

On October 21, 1994, the Plaintiffs filed the instant action asserting claims (arising from substantially the same conduct alleged in Civil Action No. 94-S-1065), against all the Defendants for conspiracy, denial of due process, negligence and gross negligence, and a claim under 26 U.S.C. §

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[2] Title 26 U.S.C. § 7433 provides:

> In general. If, in connection with any collection of Federal tax with respect to a taxpayer, any officer or employee of the Internal Revenue Service recklessly or intentionally disregards any provision of this title, or any regulation promulgated under this title, such taxpayer may bring a civil action for damages against the United States in a district court of the United States. Except as provided in section 7432, such civil action *shall be the exclusive remedy* for recovering damages resulting from such actions.

26 U.S.C. § 7433(a) (1988) (emphasis added).

[3] 26 U.S.C. § 7433(d)(1) provides:

> **(d) Limitations. (1) Requirement that administrative remedies be exhausted.** A judgment for damages shall not be awarded under subsection (b) unless the court determines that the plaintiff has exhausted the administrative remedies available to such plaintiff within the Internal Revenue Service.

26 U.S.C. § 7433(d)(1) (1988).

2671 *et seq.* the Federal Tort Claims Act (FTCA). The Plaintiffs also allege that the Defendant Internal Revenue Service, through its employees and agents, violated 26 U.S.C. § 7433 and that Defendants Peterson, Ban and Brown are individually liable to the Plaintiffs for damages resulting from their alleged violation of 26 U.S.C. § 7433. On December 21, 1994, the Defendants filed the instant Motions to Dismiss. Because the Motion raise discrete issues, this Court will consider the merits of each Motion individually.

II. Defendants' Peterson, Ban and Brown's Motion to Dismiss

Defendants Peterson, Ban and Brown move this Court for dismissal on seven alternative grounds: 1) the Plaintiffs are collaterally estopped from raising their Bivens claim by this Court's order of dismissal in Civil Action No. 92-S-1065; 2) the Bivens claim fails to state a compensable claim for relief; 3) venue is improper in Colorado; 4) Defendants Peterson, Ban and Brown are not proper defendants to a claim asserted under 28 § 7433; 5) the FTCA excludes claims arising from the collection of taxes; 6) Defendants Peterson, Ban and Brown are not proper defendants to a an FTCA claim; and 7) the Court lacks personal jurisdiction over Defendant Ban. Dismissal of a complaint is proper if, taking all well-pleaded facts as true, and construing them in the light most favorable to the Plaintiffs, it is clear that the Plaintiff can prove no set of facts in support of their claims which would entitle them to relief. Conley v. Gibson, 355 U.S. 4546 (1957); Grider v. Texas Oil & Gas Co., 868 F.2d 1147, 1148 (10th Cir. 1989).

A. The Bivens Claim

Individual federal employees may be sued for violating rights protected by the Untied States Constitution. Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971). This broad authorization does not attach where Congress has "expressly precluded the creation of such remedy by declaring that existing statutes provide the exclusive mode of redress." Bush v. Lucas, 462 U.S. 367, 373 (1983); *see also* Bivens, 403 U.S. at 397. As this Court held in its August 30, 1994 Order dismissing the Plaintiffs' claims against Defendants Peterson, Ban and Brown in Civil Action No. 92-S-1065, Title 26 U.S.C. § 7433, by its terms is the exclusive remedy for damages caused by the reckless or intentional disregard of the Internal Revenue Code or Regulation in connection with the collection of a tax, as alleged here. 26 U.S.C. § 7433(a) (text in n.2, supra). Congressional preclusion of alternative remedies is clear.

Additionally, the Plaintiffs' Bivens claim is precluded because the relevant statutory scheme "'suggests Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the court of its administration.'" Vennes v. An Unknown Number of Unidentified Agents, 26 F.3d 1448, 1453 (8th Cir. 1994), *cert. denied*, 115 S.Ct. 721 (1995) (quoting Schweiker v. Chilicky, 487 U.S. 412, 423 (1988)); *see also* Tonn v. Forsberg, 27 F.2d 1356 (9th Cir. 1994), *cert. denied*, 115 S.Ct. 1107 (1995); McMillen v. United States Dep't of Treasury, 590 F.2d 187, 190-91 (1st Cir. 1991); Wages v. Internal Revenue Service, 915 F.2d 1230, 1235 (9th Cir. 1990), *cert. denied*, 498 U.S. 1096 (1991); National Commodity & Barter Ass'n v. Gibbs, 886 F.2d 1240, 1248 (10th Cir. 1989). Congress has provided specific and meaningful remedies for taxpayers who challenge overzealous tax assessment and collection activities. Vennes, 28 F.3d at 1454. Further, where internal revenue collection is at issue, the availability of a meaningful post-deprivation remedy is sufficient to satisfy the Due Process clause. McKesson Corp v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18, 51 (1990); Bob Jones Univ. v. Simon, 416 U.S. 725, 746-48 (1974); Fuentes v. Shevin, 407 U.S. 67, 90-92 (1972); Phillips v. Comm'r, 283 U.S. 589, 595-97 (1931). Therefore the Plaintiffs' sole remedy for the conduct of IRS employees alleged here lies in the Internal Revenue Code[4].

Alternative, Defendants Peterson, Ban and Brown contend that this Court's August 30, 1994 Order in 94-S-1065, under the doctrine of issue preclusion, bars the Plaintiffs' present assertion of a Bivens claim against them based on the same facts asserted in the Prior action. The Defendants respond that the August 30, 1994 Order in 94-S-1065 is not a final order entitled to preclusive effect because claims against certain defendants remain. Following the briefing of the Instant Motion, this Court, by Order of April 10, 1995, dismissed the balance of Civil Action No. 94-S-2412 due to improper venue. Although the Plaintiffs' appeal of both order is currently pending, the legal analysis is the same[5]. The Plaintiff fail to state

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[4] The Plaintiffs argue that this Court's Order in 92-S-1065 authorized them to file a Bivens claim against Defendants Peterson, Ban and Brown after exhaustion of administrative remedies. The Plaintiffs distort this Court''s prior holding.

[5] The April 10, 1995 Order clearly indicates that the Plaintiffs' exclusive remedy is to seek redress against the Untied States (continued...)

a legally cognizable Bivens claim against Defendants Peterson, Ban and Brown.

B. Venue

Even assuming *arguendo*, that the plaintiffs sufficiency allege a Bivens claim against Defendants Peterson, Ban, and Brown, dismissal is warranted for lack of proper venue. Venue in a Bivens action is determined pursuant to 28 U.S.C. § 1391(b). Stafford v. Briggs, 444 U.S. 527 (1980). Title 28 U.S.C. §1391(b) provides that venue lies, for a civil action not founded solely on diversity, in:

> (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of the property that is the subject of the action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

28 U.S.C. § 1391(b). In the present action, all the Defendants do not reside in the same state, and virtually all of the conduct giving rise to the Plaintiffs' claims occurred in Wyoming. Therefore, venue is proper in Wyoming and the Plaintiffs' complaint against these defendants should be dismissed for improper venue[6]

C. The 28 U.S.C. § 7433 Claim

Title 26 U.S.C. § 7433 allows a taxpayer to bring a civil action, *against the United States*, for damages arising from reckless or intentional violation of the IRS Code or Regulations by IRS officers or employees. 28 U.S.C. § 7433(a) (emphasis added). The conduct alleged by the Plaintiffs as the basis for their complaint against Defendants Peterson, Ban and Brown reckless or intentional disregard of the Internal Revenue Code or Regulations as agents or employees of the IRS), falls directly within the purview of § 7433. The Defendants Peterson, Ban and Brown are not proper defendants to a civil action under § 7433. Therefore, the Plaintiffs

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[5](...continued)
pursuant to 26 U.S.C. § 7433.

[6] As discussed in Section II.C., infra., the requested transfer of venue is denied because the Plaintiffs' statutory claim against the Untied States was time-barred at the time the present action was filed.

fail to state a claim for which relief may be granted against Defendants Peterson, Ban and Brown for their conduct as agents or employees of the IRS.

D. The Federal Tort Claims Act

The Federal Trot Claims Act (FTCA), 28 U.S.C. 2651, *et seq.*, "contains a limited waiver of the federal government's sovereign immunity." National Commodity and Barter Ass'n v. Gibbs, 886 F.2d 1240, 1246 (10th Cir. 1989). However, it expressly excludes "any claim arising in respect to the assessment or collection of any tax..." 28 U.S.C. § 2680(c). Here, the Plaintiffs' complaint arises solely from activities of these Defendants related to the collection of assessed taxes. Therefore, the Plaintiffs' FTCA claim fall squarely within the statutory exception to sovereign immunity, and the Plaintiffs again fail to state a claim against Defendants Peterson, Ban and Brown for which relief may be granted[7].

III. Defendant Untied States' Motion to Dismiss

Defendant United States asserts three separate grounds for dismissal of the Plaintiffs' complaint: 1) the Plaintiffs' Bivens claim does not state a claim for relief against the United States; 2) the Plaintiffs' FTCA claim does not state a claim upon which relief may be granted; and 3) the Plaintiffs' claim pursuant to 26 U.S.C. § 7433 is barred by the applicable statute of limitations.

A. The Bivens Claim

As discussed in Section II.A., *infra*, individual federal employees may be sued for their Constitutional violations. Bivens, 403 U.S. at 397. The United States is clearly not an individual federal employee. Further, the United States is protected by sovereign immunity unless it consents to be sued. *E.g.*, Lynch v. United States, 292 U.S. 571, 582 (1934). Thus, the United States is not subject to a Bivens claim for the allegedly tortious acts of its employees.

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[7] In addition, the United Sates Attorney executed and filed a Certification of Scope of Authority for Defendants Peterson, Ban and Brown and thus their actions are deemed action of the United States and the United States is the proper party defendant. 28 U.S.C. § 2679(d)(1).

B. The FTCA Claim

As discussed in Section II.C., *infra,* a claim arising out of the collection of taxes is excluded from the United States' waiver of sovereign immunity in the FTCA. Therefore the Plaintiffs fail to state a cognizable claim for relief pursuant to the FTCA.

C. The 26 U.S.C. § 7433 Claim

The United States seeks dismissal of the Plaintiffs § 7433 claim pursuant to Fed.R.Civ.P. 12(b)(1). In a suit against the United States, "the statute of limitations is an integral part of the government's consent to suit, and as such is an issue of subject matter jurisdiction...." Crawford v. United States, 796 F.2d 924, 928-29 (7th Cir. 1986) (citation omitted). Matters outside the pleadings may be considered without converting the motion to one for summary judgment. *Id.*

Pursuant to 26 U.S.C. § 7433, the United States agreed to be subject to liability for reckless or intentional violations of the Internal Revenue Code or Regulations by IRS employees or officers. 26 U.S.C. § 7433. However, a plaintiff is required to exhaust administrative remedies and must bring suit "within 2 years after the right of action accrues." 26 U.S.C. § 7433(d)(3). "A cause of action ... accrues when the taxpayer has had a reasonable opportunity to discovery all essential elements of a possible cause of action." 26 C.F.R. § 301.74331(g)(2). Treasury Regulation § 301.7433-1(d) provides:

> (1) Except as provided in paragraph (d)(2) of this section, no action ... shall be maintained in any federal district court before the earlier of the following dates: (i) The date of the decision is rendered on a claim filed in accordance with paragraph (e) of this section; or
>
> (ii) The date six months after the date an administrative claim is filed in accordance with paragraph (e) of this section.
>
> (2) If an administrative claim is filed in accordance with paragraph (e) of this section during the last six months of the period of limitations described in paragraph (g) of this section, the taxpayer may file an action in federal district court any time after the administrative claim is filed and before the expiration of the period of limitations.

26 C.F.R. § 301.7433-1(d)(1992).

The Plaintiff contend that they did not become fully cognizant of their § 7433 claim until the United States' August 5, 1993 response to their Freedom of Information Act requests. However, the Plaintiffs admit that

on August 21, 1992, they "had serious enough suspicions to publish ..." in The Wyoming Eagle a Public Notice asserting that IRS agents engaged in the conduct which forms the basis of this action. This Court takes judicial notice of the August 21, 1992 Public Notice and holds that the statute of limitations began to run no later than August 21, 1992. Thus, the limitations period expired on August 21, 1994, notwithstanding the pendency of the Plaintiffs' administrative claim, pursuant to 26 C.F.R. § 301.7433-1(d)(2). Therefore the Plaintiffs § 7433 claim, filed October 21, 1994, is barred by the statute of limitations and should be dismissed for lack of subject matter jurisdiction.

Accordingly, IT IS ORDERED:

1. Defendants Peterson, Ban and Brown's Motion to Dismiss is GRANTED.

2. Defendant United States' Motion to Dismiss is GRANTED.

3. This civil action is DISMISSED.

DATED at Denver, Colorado, this 18th day of August, 1995.

By the Court

/s/

Daniel B. Sparr
Untied States District Judge

AMENDMENT V, TO THE UNITED STATES CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous rime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

26 U.S.C. § 7433.

Civil damages for certain unauthorized collection actions

(a) In general

If, in connection with any collection of Federal tax with respect to a taxpayer, any officer or employee of the Internal Revenue Service recklessly or intentionally disregards any provision of this title, or any regulation promulgated under this title, such taxpayer may bring a civil action for damages against the United States in a district court of the United States. Except as provided in section 7432, such civil action shall be the exclusive remedy for recovering damages resulting from such actions.

(b) Damages

In any action brought under subsection (a), upon a finding of liability on the part of the defendant, the defendant shall be liable to the plaintiff in an amount equal to the lesser of $100,000 or the sum of -

(1) actual, direct economic damages sustained by the plaintiff as a proximate result of the reckless or intentional actions of the officer or employee, and

(2) the costs of the action.

(c) Payment authority

Claims pursuant to this section shall be payable out of funds appropriated under section 1304 of title 31, United States Code.

(d) Limitations

(1) Requirement that administrative remedies be exhausted

A judgment for damages shall not be awarded under subsection (b) unless the court determines that the plaintiff has exhausted the administrative remedies available to such plaintiff within the Internal Revenue Service.

(2) Mitigation of damages

The amount of damages awarded under subsection (b)(1) shall be reduced by the amount of such damages which could have reasonably been mitigated by the plaintiff.

(3) Period for bringing action

Notwithstanding any other provision of law, an action to enforce liability created under this section may be brought without regard to the amount in controversy and may be brought only within 2 years after the date the right of action accrues.

(Added Pub. L. 100-647, title VI, Sec. 6241(a), Nov. 10, 1988, 102 Stat. 3747.)

Federal Rules of Civil Procedure - Rule 15

Rule 15. Amended and Supplemental Pleadings

(a) Amendments.

A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) Amendments to Conform to the Evidence.

When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the

party in maintaining the party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(c) Relation Back of Amendments.

An amendment of a pleading relates back to the date of the original pleading when

(1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or

(2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or

(3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

The delivery or mailing of process to the United States Attorney, or United States Attorney's designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of subparagraphs (A) and (B) of this paragraph (3) with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

(d) Supplemental Pleadings.

Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.